NOVA SCOTIA COURT OF APPEAL

Citation: *Northern Construction Enterprises Inc. v. Halifax (Regional Municipality)*, 2015 NSCA 44

Date: 20150512
Docket: CA 428571
Registry: Halifax

Between:

Northern Construction Enterprises Inc.

Appellant

v.

The Halifax Regional Municipality,
Dwight Ira Isenor and Staceylee Rudderham

Respondents

Judges:	MacDonald, C.J.N.S.; Beveridge and Farrar, JJ.A.
Appeal Heard:	February 11, 2015, in Halifax, Nova Scotia
Held:	Appeal granted with costs, per reasons for judgment of MacDonald, C.J.N.S.; Beveridge and Farrar, JJ.A. concurring
Counsel:	Peter Rogers, Q.C., for the appellant E. Roxanne MacLaurin, for the respondent, the Halifax Regional Municipality Paul Miller, for the respondents, Dwight Ira Isenor and Staceylee Rudderham

Reasons for judgment:

OVERVIEW

[1] This judgment should be read in conjunction with a decision released today in a related appeal, involving essentially the same parties. It is reported as *Northern Construction Enterprises v. Halifax (Regional Municipality)*, 2015 NSCA 43. In that decision, I set out the following overview, common to both appeals:

> **OVERVIEW**
>
> [1] The Appellant Northern proposes to develop an aggregate quarry near the Halifax Stanfield International Airport. This appeal involves the Respondent Municipality's (HRM) refusal to grant it a development permit to do so. This refusal was sustained by the Respondent Board, prompting Northern's appeal to this Court. The intervenors are concerned residents.
>
> **BACKGROUND**
>
> *The Proposal and the Regulatory Process*
>
> [2] Northern describes its proposed operation in its factum:
>
> > Once an area is cleared, overburden removed, and a working rock face established, aggregate production begins by drilling and blasting the rock face with explosives. The blasted rock would be passed through crushing and screening equipment, known as a crushing spread, to reduce it to useable dimensions and specifications for building foundations, road construction and manufacture of cement and asphalt. The Proposed Quarry would have an access road, a scale and scale house/office, quarry floor and working face(s), a staging area for equipment set-up and storage, a crushing spread (i.e., crushers, conveyors and screens), a wash station, designated stockpile areas, and a settling pond and drainage ditch.
>
> [3] Its venture into the regulatory process has left Northern with a major quandary. The fundamental problem involves confusion over whether approval is even required from the HRM. As I will explain, my reference to a quandary may be an understatement.
>
> [4] The Province has retained exclusive jurisdiction over the location of quarries. That is simple enough and the Appellant concedes that provincial approval will be required. However, it becomes complicated because the Province has ceded, to HRM, jurisdiction over "developments adjacent to…quarries". Thus emerges this insidiously complex question- What is a quarry? Is it limited to that area where material (in this case rock) is extracted from the land? Or, does it include more

such as, in this case, a crushing facility, a wash station and stockpiling areas for processed aggregate. If it includes the latter, then regulatory approval will fall exclusively to the Province, leaving the Municipality with no say in the matter. On the other hand, if it is limited to the former, then the above-noted impugned operations would be considered "developments adjacent to…quarries", thereby requiring HRM approval.

[5] To further complicate matters, HRM's corresponding by-law purports to control all activities except those "fundamental to…extraction". Yet to fully respect the Province's retained jurisdiction, one might expect the exception to include activities fundamental to a "quarry" as opposed to "extraction". This therefore begs further questions. Is there a difference between a quarry and an extraction? Would the latter be considered just one aspect (a subset if you will) of the former? If so, then, says Northern, the HRM by-law trespasses into the regulation of quarries.

[6] Yet why, asks HRM, would the Province expressly cede to HRM jurisdiction over "developments adjacent to…quarries", if it intended to retain authority over more than mere extraction. There would be no need for such a provision because everyone agrees that planning within the HRM, aside from the location of quarries, is within HRM control. So the provision must mean something more.

[7] Then it gets even more complicated because, according to the HRM Charter (a provincial statute) the Province must consider the applicable municipal planning documents before authorizing a development. (*s. 213*). In fact, Northern began its efforts by seeking just provincial approval, only to be told by the Province to either obtain HRM approval or verification that it would not be required. This prompted Northern's failed attempt to secure HRM approval, which, in turn, led to the present appeal.

[8] Then there are the procedural complications. For example, Northern maintains that HRM's by-law is illegal (to the extent that it trespasses into the regulation of quarries). However, it alternatively challenges HRM's interpretation of the by-law, maintaining that the impugned activities are excepted as being "fundamental to …extraction". Yet its challenge to the legality of the by-law had to be advanced by seeking a declaration in the Supreme Court of Nova Scotia, while its challenge to HRM's interpretation of the by-law had to be advanced by way of an appeal before the Respondent Board.

[2] The request for a declaration of invalidity referenced above was heard and denied by Justice John Murphy of the Supreme Court of Nova Scotia. That has been appealed to this Court, and we heard it in conjunction with Northern's appeal from the Nova Scotia Utility and Review Board's decision denying its appeal from HRM's refusal to grant it a development permit.

[3] In *Northern Construction Enterprises v. Halifax (Regional Municipality)*, 2015 NSCA 43, I addressed the Board appeal. This decision addresses the Supreme Court appeal. I now turn to the decision under appeal.

The Decision Under Appeal

[4] The judge had the benefit of an agreed statement of facts which he acknowledged. Note the definition of "extractive facilities", which will be central to this appeal:

> 2 Many relevant facts and the history of the debate are succinctly summarized in the following extract from an Agreed Statement of Facts provided by the parties:
>
> Agreed Statement of Facts
>
> > The Applicant, Northern Construction Enterprises Inc. ("Northern") is a New Brunswick corporation which carries on business as a construction contractor. Northern is exempt from registration requirements in Nova Scotia under s.3 of the *Corporations Registration Act*, RSNS 1989, c.101 and OIC 94-185 (March 8, 1994), N.S. Reg. 40/94.
> >
> > Subject to obtaining regulatory approval, Northern will operate an aggregate quarry located within a reasonable proximity to Halifax for development projects and for provincial, municipal and private road construction and repair projects which it plans to tender upon and carry out in and around the Halifax Regional Municipality ("HRM").
> >
> > Northern previously filed an application for industrial approval from the Nova Scotia Department of Environment ("NSE") dated June 10, 2011 to develop and operate an aggregate quarry on lands owned by Northern near the Halifax Stanfield International Airport, identified by PID#505941 ("Proposed Quarry").
> >
> > Northern filed various supplemental material with NSE since that time, which are not relevant to the issues in this proceeding, but was unable to supply proof of municipal authorization for its project. Northern's application was accordingly rejected on July 25, 2012 by NSE in correspondence stating:
> >
> > > Failure to supply a completed application in accordance with the *Environment Act* and *Approvals Procedures*

> *Regulations*, including but not limited to, proof of municipal authorizations to conduct the activity on the site pursuant to s.53(4) of the *Environment Act*.

No appeal was taken by Northern under s.137 of the *Environment Act*.

If the status of HRM's ability to regulate production of aggregate within quarry sites is determined in favour of Northern, Northern will again seek an industrial approval from NSE for the Proposed Quarry.

The Proposed Quarry is an aggregate quarry, the footprint of which is located within a site of 3.99 hectares in area. The following is a brief description of how the Proposed Quarry would produce aggregate. Once an area is cleared, overburden removed, and a working rock face established, aggregate production begins by drilling and blasting the rock face with explosives. The blasted rock will be passed through crushing and screening equipment, known as a crushing spread, to reduce it to useable dimensions and specifications for building foundations, road construction and manufacture of cement and asphalt. The Proposed Quarry will have an access road, a scale and scale house/office, quarry floor and working faces(s), a staging area for equipment set-up and storage, the crushing spread (i.e. crushers, conveyors and screens), a wash station, designated stockpile areas, and a settling pond and drainage ditch.

HRM's position has been, and continues to be, that Northern is required to obtain a development permit from HRM in order to open and operate the Proposed Quarry unless the quarry does not contain a crushing spread and various other features described in the previous paragraph. HRM acknowledges that no development permit is required for a quarry in which rock is blasted but in which no crushing or other activities which HRM views as "processing" occurs. HRM's position is that rock crushing and associated equipment in a quarry can be regulated by HRM in its *Land Use By-law* and that it is prohibited at the proposed site by the applicable By-law in this instance.

Despite its position that Northern's Proposed Quarry is not subject to regulation by HRM, Northern filed an application for a Development Permit with HRM on April 2, 2012.

> In a letter dated April 20, 2012, Mr. Creasor, a development officer, refused the Development Permit on the basis that Northern's proposed quarry operations "comprise" an "extractive facility" and are therefore prohibited under s.2.29 of the *Land Use By-law* for Planning Districts 14 and 17 which defines "extractive facilities" as:
>
> > EXTRACTIVE FACILITIES means all buildings, aggregate plants, material storage areas and weigh scales associated with extractive uses but does not include structures or storage areas which are fundamental to the activities of mining or extraction.
>
> On or about April 26, 2012, Northern filed an appeal of the development permit refusal with the Nova Scotia Utility and Review Board ("UARB"). In a decision dated January 28, 2013, the UARB dismissed Northern's appeal, upholding HRM's interpretation of s.2.29 of the *Land Use By-law*, and finding that the UARB does not have jurisdiction to determine the *vires* or legality of the By-law. Northern has filed a Notice of Appeal in the Nova Scotia Court of Appeal in respect of that UARB decision ["UARB Decision"]. The hearing of the Appeal has been adjourned without day in light of this Application.
>
> Some types of quarries do not require a crushing spread and associated equipment. For example, quarries for granite used to make memorials for cemeteries and quarries for marble to be used in countertops do not require crushing equipment.
>
> However, crushing of blasted rock is a necessary step in the production of construction grade aggregates. [underlining added; defined terms adopted in reasons]

[5] To this, the judge added these undisputed facts, including that the impugned by-law received provincial executive approval but, I note, not legislative approval:

> **4** HRM's Municipal Planning (MPS) and the LUB, including the By-law defining "Extractive Facilities" have been approved by the Nova Scotia Minister of Municipal Affairs. The area where Northern seeks to operate the proposed quarry is within the airport industrial designation, an AE-4 zone where extractive facilities are not permitted unless an applicant obtains a development permit, which HRM refused.

[6] The judge faced just one issue: the validity of the land use by-law, to the extent that it purported to regulate all quarry-related activities beyond those "fundamental to… extraction". Or, as the judge put it:

> **5** The issue is whether the By-law is *valid*; resolving that question determines whether HRM has the statutory authority or jurisdiction to regulate extractive facilities at the site of the Proposed Quarry.

[7] The judge then carefully considered the multi-faceted legislative scheme (both provincial and municipal) and applied the appropriate principles of statutory interpretation to conclude that the impugned provision was valid:

> **49** I find that the By-law does not attempt to regulate matters within the realm of provincial control such as "extraction." To the contrary, it falls within an area of municipal competence, and is consistent with the legislative scheme of the HRM Charter and the EA. [Environment Act]
>
> **50** There is no conflict between the By-law and any provincial enactment, and therefore the question of paramountcy does not arise. This is not a case where a municipal by-law says "no" and a provincial enactment says "yes." To the contrary, in this instance, the applicant is **required** to satisfy the requirements of the municipality with respect to zoning and permitting.
>
> **51** Although not binding on this Court, recent case law from British Columbia holds that when provincial authorities in that province determine whether extraction can take place, municipalities can prohibit or regulate post-extractive or processing activities on the quarry lands. **Pitt River Quarries Ltd. v. Dewdney-Alouette**, [1995] B.C.J. No. 1028 (S.C.); **Nanaimo (Regional District) v. Jameson Quarries Ltd.** 2005 BCSC 1639; **Cowinchan Valley (Regional District) v. Norton** 2005BCSC 1056; **Squamish (District) v. Great Pacific Pumice Inc.** 2003 BCCA 404. Those decisions recognized that municipal by-laws can regulate processing while coexisting with the provincial laws regulating removal or extraction. Northern suggests these British Columbia decisions are of no assistance because by definition in that province's Municipal Act "land" includes mines and minerals. There is no similar definition in the HRM Charter; however, determination whether a quarry is "land use" is not the issue in this case, which is concerned with regulating extractive facilities.
>
> **52** My finding that HRM has power to enact the By-law is made without relying on those British Columbia decisions; however, that case law is helpful as it recognizes that extracting and processing are distinct activities, and that provincial and municipal laws can coexist to regulate different aspects of the industrial process.

53 The By-law must be considered in the context of an overall statutory scheme which assigns responsibility for planning and development to HRM under the Charter, and includes the provisions in the EA which recognize municipal responsibility and authority in relation to industrial approvals.

54 Applying a modern and purposive interpretation to the plain and ordinary language in the HRM Charter and the EA, I conclude that the EA and the By-law can coexist. The legislature has recognized that municipalities have a role to play in the location of extractive facilities. The Supreme Court of Canada has affirmed that a deferential approach should be applied. The Province has not retained jurisdiction to regulate extractive facilities or production and processing activity; the HRM Charter gives the municipality authority to pass by-laws regulating industries and associated works.

CONCLUSION

55 HRM has the statutory authority to regulated extractive facilities at quarry sites; the By-laws is *intra vires*. Northern's application for an order declaring the By-law invalid is dismissed.

ISSUE AND STANDARD OF REVIEW

[8] In its notice, Northern identifies this three-part ground of appeal:

Grounds of appeal

The grounds of appeal are

(1) that the learned Application Judge erred in holding that the Province had conferred legislative authority upon the Halifax Regional Municipality (the "Municipality") to regulate by Land Use By-law the use of rock crushing equipment and other essential aggregate production activities within an aggregate quarry and in particular:

a. that the learned Application Judge erred in failing to find that section 2.29 of the Land Use By-law purports to allow the Municipality to do indirectly what is prohibited from doing directly, to regulate the location of quarries. By purporting to prohibit rock crushers within an aggregate quarry, the Municipality is effectively regulating the location of aggregate quarries as it is not possible to produce aggregate without a rock crusher;

b. that the learned Application Judge failed to give effect to the limits within the express jurisdiction granted by the Province to the Municipality to regulate land uses <u>adjacent</u> to a quarry in s. 235(4)(j) of the *Halifax Regional Municipality Charter*, SNS 2008, c. 39; and

c. that the learned Application Judge failed to give adequate weight to the legislative and judicial history of exclusive provincial jurisdiction to regulate the location of quarries, including the decision of the Supreme Court of Nova Scotia in *Annapolis (County) v Hankinson*, 2002 NSSC 149, and the absence of legislative amendment thereafter.

[9] As will become apparent, it will be unnecessary to consider ground 1(c). Furthermore, I would synthesize grounds (1) a. and b. to arrive at just one issue on appeal. It is the same single issue the judge faced: is s. 2.29 of the by-law a valid exercise of municipality authority?

[10] This issue involves a question of law which we would, therefore, review on a correctness standard. See *Elderkin* v. *Nova Scotia (Service Nova Scotia and Municipal Relations)*, 2013 NSCA 79 at paragraph 18. Also see *London (City) v. RSJ Holdings Inc.*, 2007 SCC 29 at para. 37. This means that should our interpretation of the legislative scheme differ from that of the judge, our interpretation would prevail.

ANALYSIS

[11] In conducting his analysis, the judge identified the modern approach to statutory interpretation particularly as it applies to the bestowing of municipal authority by provinces. His review was thorough and bears repeating:

> **32** Principles of interpretation respecting municipal by-laws addressed recently by the Supreme Court of Canada and Nova Scotia Court of Appeal assist in determining if HRM has authority to enact the By-law.
>
> **33** The Supreme Court of Canada has held that "the party challenging a by-law's validity bears the burden of proving that it is *ultra vires*." **1114957 Canada Ltee. v. Town of Hudson**, [2001] S.C.J. No. 42 ("**Hudson**") at para. 21.
>
> **34** A modern approach of deference has evolved in interpreting the scope of municipal powers. This is articulated by McLachlin, J., as she then was, in **Shell Canada Products Ltd. v. Vancouver (City)**, [1994] 1 SCR 231 at 244, quoted in **Hudson**, *supra*, at para. 23:
>
> > Recent commentary suggests an emerging consensus that Courts must respect the responsibility of elected municipal bodies to serve the people who elect them and exercise caution to avoid substituting their views of what's best for the citizens for those municipal councils. Barring clear demonstration that a municipal

> decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the "benevolent construction" which this Court referred to in *Greenbaum*, and confer the powers by reasonable implication. Whatever the rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives.

35 The Modern Rule of statutory interpretation requires that courts determine the meaning of legislation in its total context (see R. Sullivan, *Constructions of Statutes*, (LexisNexis Canada Inc. 2008) Chapter 11)

36 A broad and purposive approach is also consistent with the Nova Scotia *Interpretation Act*, R.S.N.S. 1989, c.235, s.9(5):

> 9(5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
> (b) the circumstances existing at the time it was passed;
> (c) the mischief to be remedied;
> (d) the object to be attained;
> (e) the former law, including other enactments upon the same or similar subjects;
> (f) the consequences of a particular interpretation; and
> (g) the history of legislation on the subject.

37 The Supreme Court of Canada has directed that the character of modern municipalities requires a "purposive approach" to the interpretation of municipal powers. The basis for this approach was outlined in **City of Calgary v. United Taxi Drivers' Fellowship of Southern Alberta, et al.,** 2004 SCC 19 as follows:

> **6** The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. This notable shift in the nature of municipalities was acknowledged by McLachlin J. (as she then was) in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at pp.244-45. The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced: *Nanaimo, supra*, at para. 18. This interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation. Several provinces have moved away from the practice of granting municipalities specific powers in particular subject

> areas, choosing instead to confer them broad authority over generally defined matters: *The Municipal Act*, S.M. 1996, c. 58 C.C.S.M. c. M225; *Municipal Government Act*, S.N.S. 1998, c. 18; *Municipal Act*, R.S.Y. 2002, c. 154; *Municipal Act*, 2001, S.O. 2001, c. 25; *The Cities Act*, S.S. 2002, c. C-11.1. This shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes: *Shell Canada*, at pp. 238 and 245.
>
> 8 A broad and purposive approach to the interpretation of municipal legislation is also consistent with this Court's approach to statutory interpretation generally. The contextual approach requires "the words of an Act…to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 (CanLII), at para.26.

38 In **DeWolfe**, *supra*, Justice Cromwell discussed the Nova Scotia Court of Appeal's approach to statutory interpretation regarding municipal powers at para.82:

> 82 I will first set out the correct approach to statutory interpretation, provide my understanding of the powers conferred on the municipality and then conclude…
>
> 1. The purposive and contextual approach:
>
> 83 The Supreme Court of Canada has embraced a "broad and purposive" approach to the interpretation of statutes empowering municipalities: *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19 (CanLII), [2004] 1 S.C.R. 485; [2004] S.C.J. No. 19 (Q.L.); 2004 SCC 19. Following the approach to the interpretation of statutes generally, provisions conferring municipal powers must be read "…in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of [the Legislature].": E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto and Vancouver, Butterworths & Co. (Canada) Ltd., 1983) at 87; *Bell ExpressVu Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 (CanLII). As was said in *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28 (CanLII), [2003] 1 S.C.R. 476 at para.20, this is the "…starting point for statutory interpretation in Canada…"
>
> 84 Municipalities, of course, must act only within their statutory powers. This is the fundamental requirement of legality: a statutory delegate is limited to acting within the scope of its delegated

authority. Applying this principle is the rule of law in action. But this is not the same thing as narrowly interpreting the statutes which confer authority. That approach is no longer accepted in relation to interpreting municipal powers in Canada, particularly where those powers are conferred in broad and generous terms as they are under the M.G.A. [now HRM Charter]

85 The distinction between the principle of legality and the principle of interpretation was succinctly described by Major J. in *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13 (CanLII), [2000] 1 S.C.R. 342; [2000] S.C.J. No. 14; 2000 SCC 13 at paras. 18-19:

18 The process of delineating municipal jurisdiction is an exercise in statutory construction. There is ample authority, on the interpretation of statutes generally and of municipal statutes specifically, to support a broad and purposive approach.

19 While **R. v. Greenbaum**, 1993 CanLII 166 (SCC), [1993] 1 S.C.R. 674 favoured restricting a municipality's jurisdiction to those powers expressly conferred upon it by the legislature, the Court noted that a purposive interpretation should be used in determining what the scope of those powers are…

86 In other words, while municipalities, in common with all other statutory delegates, must operate strictly within the limits of their delegated powers, the statutes which confer those powers must be interpreted according to Driedger's principle.

87 The first task, therefore, is to read the words of the enactment in their entire context and in their grammatical and ordinary sense harmoniously with its scheme and objective. If that approach does not provide a clear answer to the meaning of the text, principles calling for "strict construction" or "express authority" may be resorted to. But the Supreme Court has said that these sorts of principles should be applied only when the interpretation according to Driedger's principle leads the interpreter to an ambiguity in the legislation, that is, to the conclusion that the text is reasonably capable of more than one interpretation: **Bell ExpressVu** at para. 29. As Iacobucci J. put in **Bell ExpressVu** at para. 28: "Other principles of interpretation – such as the strict construction of penal statutes… -- only receive application where there is ambiguity as to the meaning of a provision.

88 Acceptance of this "board and purposive" approach to interpretation has coincided with adoption of a new approach to drafting municipal legislation. **The new approach to drafting is evident in Nova Scotia's M.G.A.** [now HRM Charter] **Unlike the older style of drafting that defined municipal powers narrowly and specifically, the M.G.A. confers authority in broader and more general terms: see generally**

> ***United Taxi*, *supra* at para. 6. As Bastarache J. noted in *United Taxi*, these developments in the interpretative approach and in legislative drafting reflect the evolution of the modern municipality which requires greater flexibility in carrying out its statutory responsibilities:** at para. 6 [emphasis and bracketed words added]
>
> 39 Justice Cromwell noted that the *Municipal Government Act* (now HRM Charter) is drafted with the modern trend in mind:
>
> 95 The M.G.A. is drafted in accordance with the modern trend identified by Bastarache J. in **United Taxi**. Section 2 sets out the purpose of the statute is to give "broad authority…, including broad authority to pass by-laws, and to respect the right [of municipalities) to govern…in whatever ways the councils consider appropriate within the jurisdiction given to them" and to "enhance the ability of councils to respond to present and future issues in their municipalities…". This statement of purpose guides the interpretation of the rest of the statute, particularly provisions which, like those in issue here, grant authority to the municipality in very broad terms.

[12] I endorse all of this. For example, I acknowledge that, when interpreting statutes, we must adopt a "benevolent construction" that recognizes the autonomy provinces have bestowed upon our municipalities. (*Shell Canada Products Limited, supra*). The development of the modern municipality must not be stifled by Courts that narrowly interpret its powers. (*United Taxi*, *supra*).

[13] Instead, the modern municipality requires "greater flexibility in carrying out its statutory responsibilities" (*DeWolfe, supra*). Therefore, we must look to the legislation's total context with a broad and purposive approach when interpreting municipal powers. This, when all is said and done, reflects the oft-quoted *Dreidger's Modern Principle* of statutory interpretation as found in *Sullivan on the Construction of Statutes* (6th) at page 7:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[14] However, when I apply these very same principles, I reach the opposite conclusion to that of the application judge. For the following reasons, I conclude that HRM, with this by-law, trespassed into the Province's jurisdiction to regulate the location of quarries.

[15] I start with this basic premise. No approach to statutory interpretation, however benevolent, purposive and contextual, can create authority that does not exist. It must either be expressed or reasonably implied from the bestowing legislation. After all, without provincial delegation, municipalities, as creatures of statute, would have no authority. Binnie J., in *London (City), supra*, (albeit in a standard of review context) explains:

> 37 In my view, this approach is sound. While the language in s. 273(1) of the *Municipal Act, 2001* is broad, the supervisory jurisdiction of the Superior Court, when considered in context, is more limited and should not be read as usurping the role of the OMB and its specialized expertise. The question of jurisdiction is no longer before this Court. Nonetheless, the City argues that the overarching principle which should govern the court on a s. 273 review of a municipal by-law is one of deference. While this approach may be appropriate on a review of the merits of a municipal decision, in my view, the City's argument is misguided here. Municipalities are creatures of statute and can only act within the powers conferred on them by the provincial legislature: *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at p. 273. On the question of "illegality" which is central to a s. 273 review, municipalities do not possess any greater institutional expertise than the courts – "[t]he test on jurisdiction and questions of law is correctness": *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13, at para. 29.

[Emphasis added]

[16] At the same time, I fully acknowledge that its Charter bestows upon HRM, broad autonomy so that it may operate independently as a modern Canadian municipality. This is spelled out clearly in the Charter's purpose:

> Purpose of Act
>
> 2 The purpose of this Act is to
>
> (a) give broad authority to the Council, including broad authority to pass by-laws, and respect its right to govern the Municipality in whatever ways the Council considers appropriate within the jurisdiction given to it;
>
> (b) enhance the ability of the Council to respond to present and future issues in the Municipality; and
>
> (c) recognize that the functions of the Municipality are to
>
> (i) provide good government,

(ii) provide services, facilities and other things that, in the opinion of the Council, are necessary or desirable for all or part of the Municipality, and

(iii) develop and maintain safe and viable communities.

[17] This broad delegation includes primary jurisdiction over land-use planning. The judge noted this twice in his decision by referring to s. 208 which sets out the purpose of the "Planning and Development" part of the Charter. He wrote:

> **25** The HRM Charter (s.2) confers broad authority on the respondent to pass by-laws. Part VII gives HRM the scope and power to enact by-laws respecting business activities, development and industry (s.188) and Part VIII gives primary authority for planning and development within the Municipality's jurisdiction (s.208)
>
> …
>
> **40** Applying the purposive and contextual approach mandated by the Supreme Court of Canada and Nova Scotia Court of Appeal I find that the HRM Charter gives the Municipality wide powers respecting planning and zoning. Section 208 recognizes the primary authority of HRM with respect to planning and development, and land use by-laws are enacted to enable the policies set out in municipal planning strategies.

[18] However, respectfully, the judge did not note that bestowing primary authority over planning was only one of several expressed purposes of the Charter's "Planning and Development" provisions. In fact, the first stated purpose suggests quite the opposite. It identifies the Province's goal to protect "its interests in the use and development of land". Here is the entire provision:

> Purpose of Part
>
> 208 <u>The purpose of this Part is to</u>
>
> (a) <u>enable Her Majesty in right of the Province to identify and protect its interests in the use and development of land</u>;
>
> (b) enable the Municipality to assume the primary authority for planning within its jurisdiction, consistent with its urban or rural character, through the adoption of municipal planning strategies and land-use by-laws consistent with interests and regulations of the Province;
>
> (c) establish a consultative process to ensure the right of the public to have access to information and to participate in the formulation of planning

> strategies and by-laws, including the right to be notified and heard before decisions are made pursuant to this Part; and
>
> (d) provide or the fair, reasonable and efficient administration of this Part.

[Emphasis added]

[19] This is noteworthy because, whatever broad authority might have been bestowed, everyone agrees that the Province reserved the right to control the location of quarries. In fact, this is reflected in the HRM's planning strategy where it expresses a goal to, one day, secure this jurisdiction. Everyone also agrees that that is yet to happen. HRM, also in its factum, acknowledges that the Province retains jurisdiction over the location of quarries.

> The Municipal Planning Strategy for Planning Districts 14/17 (MPS) acknowledges provincial jurisdiction in relation to the location of quarries. While HRM does not have the authority to control the location of pits and quarries it does have the authority to regulate Extractive Facilities. This is set out in Policy P-136 which provides for Extractive Facilities within portions of the Resource designation by way of development agreement (AB Part II Volume II Tab 14 p. 376-378). This would include the ability to regulate, by development agreement, such things as scale and scale house/office, crushing equipment, staging area for crushing equipment, portable conveyor and screens, wash station, and storage areas for stockpiling crushed or processed aggregate.

[Emphasis added]

[20] Furthermore, HRM obviously recognized this retained provincial authority when it excepted activities "fundamental to…extraction" from the list of quarrying activities it purported to regulate ("extractive facilities"). The problem, of course, is that this exception does not square with what the Province reserved. In other words, instead of excepting activities "fundamental to…quarries", the by-law excepts only those activities fundamental to extraction. The corollary, in my view, is that this by-law unilaterally limits the Province's authority to regulate the location of only those quarries where crushing and related processing activities would not be performed. Yet, I could find nothing on this record, either express or implied, to support this broader authority. In fact, the only express authority, by inevitable inference, limits HRM authority to developments *adjacent* to quarries":

> 235 (4) A land-use by-law may
>
> (j) regulate the location of developments adjacent to pits and quarries

[21] Now HRM, I realize, asserts that a quarry involves no more than extraction. That is indeed true for some quarries, as the agreed statement of facts acknowledges. But that can hardly be true for most aggregate quarries, where the process involves reducing large boulders into marketable aggregate. This, no one would seriously challenge, must be done by crushing and related activities.

[22] Therefore, in my view, looking at this legislative scheme as a whole, applying a benevolent and purposive interpretation, I see that the Province wanted to delegate to the HRM the ability to become an autonomous modern Canadian municipality. This would include delegating to HRM, primary control over planning within its boundaries. This would be achieved through a democratically developed municipal planning strategy, that would in turn be given life by appropriate land use by-laws for the various districts.

[23] At the same time, I see that the Province wished to retain control over the location of quarries. This is clear and undisputed. No benevolent interpretation can suggest otherwise. In fact, the only fair inference is that by granting express authority over developments *adjacent* to quarries, the Province excluded authority over quarries.

[24] Now I realize that it is possible to interpret the Province's retained authority over quarries to be limited to the actual extraction process and all activities fundamental to that. That, arguably, may even represent the literal meaning of the word. It would certainly be in keeping with an interpretation "benevolent" to the modern municipality. But, when I view the legislative scheme in its entire context and apply a purposeful approach, I cannot reasonably stretch the interpretation that far. After all, as *Sullivan*, *supra*, reminds us, a purposive and contextual approach calls for a reasonable result at the end of the day:

> 2.9 At the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with accepted legal norms; it is reasonable and just.

[25] Yet, as I see it, the HRM's proposed interpretation would lead to at least two unreasonable conclusions. For example, consider this hypothetical. The HRM, under its proposed interpretation, could prohibit the use of extractive facilities

anywhere within its boundaries. That would result in no aggregate production anywhere in HRM. All quarrying operations would be limited to blasting operations. Rock separated by blasting, but destined to be aggregate, would have to be transported elsewhere. There would be no crushing facilities anywhere in HRM. Surely that is not what the Province envisioned when it decided to retain control over the location of quarries.

[26] Then HRM's interpretation appears even more questionable when one tries to practically determine activities that would be "fundamental to …extraction". For example, HRM suggests that Northern's proposal could be accommodated by blasting the rock (without the need for HRM approval) and transporting the large boulders to a location where extractive facilities are permitted. Financial impracticalities aside, what if the remnants, after blasting, are too large to truck away? What if they would be too heavy for highway regulations? There, the HRM concedes that the remnants could be re-blasted until they were reduced to a transportable size. I refer to the cross-examination of Trevor Creasor:

> …
>
> MR. ROGERS: Both the crushing and the stockpiling are steps taken after the physical act of separation of the rock from the native soil. Correct?
>
> A. Correct.
>
> Q. Okay. And what if the result of the blast is a piece of aggregate that can't be moved with a truck? It's a large piece of aggregate. You can't lift it into a truck. Are you allowed to blast it again or to crush it?
>
> A. I would suspect, yes.
>
> Q. Is it…
>
> A. To blast it. But if you're…again, the way the definition reads, if you're crushing it, you have essentially an aggregate plant on site crushing the material, which falls under the definition of extractive facility, which wouldn't be permitted.
>
> Q. But in your view, you could re-blast it and still be within the confines of the by-law.
>
> A. I think so, yes.

> Q. Okay. Isn't it the case that blasting and crushing are two ways of reducing the size of material?
>
> A. Yes, I'd agree.
>
> [Appeal Book, Tab 68, pg. 1570]

Yet, by that logic, the developer could theoretically blast away until the rock was small enough to market as aggregate. Respectfully, it makes no sense to suggest that, on the same site, you could reduce the size of rock by continuous blasting but not reduce the size of rock by crushing. Either the concept of quarrying is limited to pure extraction or it is not.

[27] In highlighting these examples, I acknowledge HRM's invitation to compare this legislation to guidelines, emanating from the provincial *Environment Act*, which provides a definition of quarry more consistent with simple extraction. It explains it this way in its factum.

> 16. Section 235(4)(j) of the *Charter* provides that a by-law may regulate the location of developments adjacent to pits and quarries. There is no definition of "quarry" in the *Charter*. It is submitted that a "quarry" for the purposes of s. 235(4)(j) is simply the excavation site. Support for the use of the term quarry in this way can be found in the EA Guide, and the Activities Designation Regulations.
>
> 17. The EA Guide - Appendix C (**AB Part II Volume II Tab 18 p. 609**) and the Guidelines (**AB Part II Volume II Tab 19 p. 615**) define "quarry" as "an excavation requiring the use of explosives made for the purpose of removing consolidated rock from the environment". The Activities Designation Regulations (**AB Part II Volume II Tab 17 p. 570**) requires that an Industrial Approval be obtained under Division V, Part 2 s. 13(f) for a quarry where a ground disturbance or excavation is made for the purpose of removing aggregate with the use of explosives.
>
> 18. There is a separate definition for "Associated Works" contained in both the EA Guide and the Guidelines. "Associated Works" means "any building, structure, processing, facility, pollution abatement system or stockpiles of aggregate". This demonstrates the intention to treat "extraction" separately from the "associated works" at the development site.

[28] Respectfully, this reference to non-legislative guidelines involving a different piece of legislation is not enough to overcome the unreasonable outcomes mandated by the HRM's proposed interpretation.

[29] In short, I agree with Northern in its factum when it asserts that, with the by-law, the HRM is attempting to do indirectly what is it unauthorized to do directly:

> 24. There is no dispute between the parties and long recognized in the land use planning circles that municipalities do not have the authority to regulate quarries. This is conceded by HRM and the Intervenors and is explicitly reflected in HRM's planning documents. That, however, is exactly what the Municipality is attempting to do with the By-law. This engages the colourability doctrine which is described by Professor Hogg, in *Constitutional Law of Canada* [4th ed. (Toronto: Carswell 1997) at p. 392], as follows: "[t]he colourability' doctrine is involved when a statute bears the formal trappings of a matter within jurisdiction but in reality is addressed to a matter outside jurisdiction." Another way of describing the "colourability" doctrine is that a legislative body cannot do indirectly what it cannot do directly.
>
> 25. The By-law is clearly directed at regulating quarries as it prohibits anything done at a quarry site other than simply blasting. To prohibit scales and offices, crushers, screens and storage areas is to prohibit operations which are necessary to quarry aggregate. By prohibiting the key features of an aggregate quarry, the Municipality is prohibiting aggregate quarries themselves.
>
> 26. The fact that limited purpose rock quarries for tombstones or flagstones are not prohibited by the By-law does not mean that the Municipality is not regulating quarries. It indicates only that Municipality is not regulating those particular quarries. The Municipality is regulating the location of the biggest and most important quarries – namely those which blast, crush and screen rock for aggregate, a construction material which is used at virtually all development sites.

[30] In conclusion, applying the above principles of statutory interpretation, the impugned by-law trespasses into provincial jurisdiction and to that extent, it is declared invalid.

[31] I would further interpret the concept of quarrying to encompass all functions and facilities required to reduce the product to marketable size. This would have to be determined factually on a case by case basis. For greater clarity, Northern's proposed operations would be considered fundamental to quarrying. These are listed in the agreed statement of facts and repeated here for ease of reference:

> The Proposed Quarry is an aggregate quarry, the footprint of which is located within a site of 3.99 hectares in area. <u>The following is a brief description of how the Proposed Quarry would produce aggregate. Once an area is cleared, overburden removed, and a working rock face established, aggregate production begins by drilling and blasting the rock face with explosives. The blasted rock</u>

> will be passed through crushing and screening equipment, known as a crushing spread, to reduce it to useable dimensions and specifications for building foundations, road construction and manufacture of cement and asphalt. The Proposed Quarry will have an access road, a scale and scale house/office, quarry floor and working faces(s), a staging area for equipment set-up and storage, the crushing spread (i.e. crushers, conveyors and screens), a wash station, designated stockpile areas, and a settling pond and drainage ditch.
>
> [Emphasis added]

[32] It follows that Northern's proposed project, if limited to the above description, will not require HRM approval. That does not end the matter. Northern will still, as acknowledged, require provincial approval.

DISPOSITION

[33] I would allow the appeal by declaring s. 2.29 of HRM's by-law for Planning Districts 14 and 17 to be invalid. Any replacement provision must apply only to land "adjacent to … quarries" as I have described above.

[34] I would further reverse the costs paid by the Appellant pursuant to the Supreme Court order so that they be returned to the Appellant, with the Respondent HRM paying $5,000 and the Intervenors paying $2,500 to the Appellant. I would further direct costs on appeal to the Appellant of $2,500 by the HRM and $1,000 by the intervenors (both inclusive of disbursements).

MacDonald, C.J.N.S.

Concurred in:

Beveridge, J.A.

Farrar, J.A.